

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

Case No. 18-cv-40123

Keith W. McKenzie and Paulette L. McKenzie,

Plaintiffs

v.

Option One Mortgage, Orlans PC, et. al.,

Defendants

**MEMORANDUM OF LAW IN SUPPORT OF
ORLANS PC'S MOTION TO DISMISS**

Introduction

Orlans is foreclosure and eviction counsel for the mortgagee, HSBC Bank USA, National Association, as Trustee of For ACE Securities Corp. Home Equity Loan Trust, Series 2004-OP1 Asset-Backed Pass-Through Certificates ("HSBC"), in regard to the subject property, 32-34 Edgewater Ave, Unit 2 aka 34 Edgewater Ave, Shrewsbury, Massachusetts 01545 ("the Property"). In November 2017, the Central Housing Court granted judgment in favor of HSBC. (*Exhibit A*) The lockout is currently scheduled for August 22, 2018.

Legal Argument

Plaintiffs' Complaint does not state a claim upon which relief can be granted. The United States Supreme Court has issued a decision in a case that specifically discusses the standard for dismissal. In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), the Court seemingly modified the time-honored standard for dismissal set forth in Conley v. Gibson, 355 U.S. 41, 47 (1957), replacing that decision's "no set of facts" language for a "plausibility" standard with respect to notice pleading in complaints. In other words, according to the Supreme Court in Bell

Atlantic, a court should not dismiss a complaint if there are “enough facts to state a claim to relief that is plausible on its face.” 127 S. Ct. at 1974, or if the plaintiff has demonstrated a “reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support his or her claims” *Id.* at 1967.

There are thirteen counts in Plaintiff’s Complaint and any claims raised against Orlans are in relation to Orlans conducting an “illegal foreclosure”. First, it should be noted that the validity of the foreclosure sale was already adjudicated in HSBC’s favor in the eviction action where one of the Plaintiffs’ claims was that the “foreclosure was invalid”. (*Exhibit B*) Plaintiffs allude to the eviction action in their Complaint when they seek injunctive relief to prevent HSBC from “enforcing the execution”.

Second, as foreclosure counsel, Orlans initiates foreclosure and sends any notices based on instructions from their client. The claims raised in this action are claims (all of which are barred by res judicata) against the mortgagee bank and/or the servicer. Orlans cannot be held liable for claims brought against its clients. “Generally speaking an attorney is ‘immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.’” Sain v. HSBC Mortgage Services, 2009 U.S. Dist. Ct. LEXIS 77336.

The Plaintiffs in this action are the mortgagors on the subject loan. Orlans owes them no fiduciary duty. See Balerna v. Gilberti, 281 F.R.D. 63, 65 n.4 (D.Mass. 2012). “Massachusetts law makes it plain as a pikestaff that an attorney does not owe a fiduciary duty to a person who she does not represent.” Darlene Manson, et al. v. GMAC Mortgage LLC, et al., 2012 U.S. Dist. LEXIS 59492, at 28 (D. Mass. Apr. 30, 2012), citing Logotheti v. Gordon, 414 Mass. 308, 312 (1993); Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 522 (1989); Page v. Frazier,

388 Mass. 55, 61-68 (1983). See also MacMillan v. Scheffy, 147 N.H. 362, 365 (2001) (“[W]e decline to impose on an attorney a duty of care to a non-client whose interests are adverse to those of the client.”). To find an attorney liable for the actions of his/her client is not only unfair but it impedes effective representation of the client.

Conclusion

For all of the reasons set forth above, Plaintiffs’ Complaint fails to state a claim for which relief can be granted, in particular as to Orlans. As such, Orlans must be dismissed from this action pursuant to Fed.R.Civ.P. 12(b)(6).

Respectfully submitted,
Orlans PC,
By its Attorney,

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